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FM AMEMBASSY BUENOS AIRES
TO SECSTATE WASHDC IMMEDIATE 2078

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E.O. 11652: N/A
TAGS: SHUM, AR
SUBJECT: RIGHT OF OPTION

REF: BUMPUS-CHAPLIN TELCON 9/2/77

1. LA OPINION OF SEPTEMBER 2 FRONT PAGED LATEST IN SERIES OF PUBLIC LEADKS PRESAGING THE REESTABLISHMENT OF CONSTITUTIONAL RIGHT OF OPTION FOR PERSONS DETAINED UNDER PRESIDENTIAL ORDER TO LEAVE THE COUNTRY. STORY QUOTES "OFFICIAL SOURCES" THAT IMPLEMENTING DECREE ON RIGHT OF OPTION HAS BEEN PRACTICALLY FINISHED AND WILL BE APPROVED IN A FEW DAYS. THE REESTABLISHMENT OF THE RIGHT OF OPTION WAS ALSO REPORTED TO HAVE BEEN APPROVED IN PRINCIPLE AT THE MEETING OF THE MILITARY JUNTA ON AUGUST 29.

2. EMBASSY HAS RECEIVED PARALLEL SERIES OF LEAKS SINCE LATE JULY ON REESTABLISHMENT ISSUE. ON SEPTEMBER 1, COL. (RET.) RUIZ PALACIOS, DEPUTY MINISTER OF INTERIOR, INFORMED DEFATT THAT GOA WOULD REESTABLISH "REGULATED RIGHT OF OPTION." RIGHT OF OPTION PETITIONS WOULD BE DECIDED BY A BOARD HEADED BY MINISTER OF INTERIOR AND COMPOSED OF GENERAL OR FLAG RANK OFFICERS FROM EACH SERVICE. JUNTA WILL CONTROL WHO LEAVES CLOSELY. PETITIONS WILL BE

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PERMITTED UNDER PROCEDURAL RULES SIMILAR TO THOSE IN PAST,

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ARGENTINA PROJECT (S200000044)
U.S. DEPT. OF STATE, A/RPS/PS
Margaret P. Griefeld, Director
(X) Release () Excise () Deny
Exemption(s):
Declassify: () In Part (X) In Full Dec 01 RT 2001
() Classify as () Extend as () Downgrade to
Date Declassify on Reason

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BUT FINAL DECISION WILL BE MADE BY BOARD. EMBASSY BELIEVES THAT NEW SENIOR REVIEW BOARD PROCEDURE WAS NECESSARY IN ORDER TO GET APPROVAL FOR REESTABLISHING ANY KIND RIGHT OF OPTION PROGRAM.

3. CONSTITUTIONAL BASIS FOR RIGHT OF OPTION -

ARTICLE 23 OF ARGENTINE CONSTITUTION OF 1853 SETS OUT BROAD BRUSH STATE OF SIEGE POWERS AS FOLLOWS: "IN THE EVENT OF INTERNAL DISORDER OR FOREIGN ATTACK ENDANGERING THE OPERATION OF THIS CONSTITUTION AND OF THE AUTHORITIES CREATED THEREBY, THE PROVINCE OR TERRITORY IN WHICH THE DISTURBANCE OF ORDER EXISTS SHALL BE DECLARED IN A STAGE OF SIEGE AND THE CONSTITUTIONAL GUARANTEES SHALL BE SUSPENDED THEREIN. BUT DURING SUCH SUSPENSION THE PRESIDENT OF THE REPUBLIC SHALL NOT CONVICT OR APPLY PUNISHMENT UPON HIS OWN AUTHORITY. HIS POWER SHALL BE LIMITED, IN SUCH A CASE, WITH RESPECT TO PERSONS, TO ARRESTING THEM OR TRANSFERRING THEM FROM ONE POINT OF THE NATION TO ANOTHER, IF THEY DO NOT PREFER TO LEAVE ARGENTINE TERRITORY."

THIS PROVISION WAS BORROWED FROM THE CHILEAN CONSTITUTION OF 1833 AND INCORPORATED IN THE ARGENTINE CONSTITUTION IN 1853. TWENTY YEARS AGO, ARGENTINE LEGAL SCHOLAR VIAMONTE DESCRIBED THE ARTICLE AS "PARTICULARLY DISGRACEFUL, FOR ITS CONCEPTUAL VAGUENESS AND FOR ITS GRAMMAR."

ON MARCH 24, 1976, THE JUNTA IN ONE OF ITS FIRST LEGAL ACTS SUSPENDED THE RIGHT OF OPTION IN THE LAST CLAUSE OF ARTICLE 23. ON MARCH 29, THE JUNTA ISSUED DECREE 21.338 WHICH WENT FURTHER AND RETROACTIVELY ANNULLED THE RIGHT OF OPTION. THIS WAS THE FIRST TIME IN ARGENTINE HISTORY THAT THE RIGHT OF

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OPTION HAD EVER BEEN SUSPENDED, AS UNDER ARGENTINE LEGAL PRACTICE, THE RIGHT OF OPTION IS LESS OF A "RIGHT" AND MORE OF A PROCEDURE. THE TERM "RIGHT OF OPTION" IN ENGLISH CARRIES A CONNOTATION VERY DIFFERENT FROM TRADITIONAL ARGENTINE PRACTICE.

4. PAST RIGHT OF OPTION PROCEDURES

THE ARGENTINE PENAL CODE DETAILS PROCEDURAL STEPS FOR

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THE RIGHT OF OPTION. THESE PROCEDURES CAN BE WAIVED BY THE EXECUTIVE AT ANY TIME TO GRANT PERSONS DETAINED BY PRESIDENTIAL ORDER (BAJO EL PODER EJECUTIVO NACIONAL, I.E.P, E.N.) THE RIGHT TO LEAVE THE COUNTRY. THE PREVIOUS PROCEDURES PROVIDE FOR A MULTI-STEP PROCESS:

(A) FROM THE TIME THAT A PERSON IS PLACED UNDER PRESIDENTIAL DETENTION (P.E.N.) THE INDIVIDUAL IS BARRED FROM PRESENTING A PETITION SEEKING THE RIGHT OF OPTION FOR 90 DAYS.

(B) AFTER THIS PERIOD, A PEN DETAINEE MAY SUBMIT A RIGHT OF OPTION PETITION FORM VIA PRISON AUTHORITIES TO THE MINISTRY OF INTERIOR.

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(C) THE EXECUTIVE IS THEN REQUIRED TO REPLY TO THE PETITION WITHIN 90 DAYS FROM ITS DATE OF SUBMISSION.

(D) IF THE PETITION IS ACCEPTED, THE MINISTRY OF THE INTERIOR ISSUES A CARD TO THE DETAINEE'S FAMILY TO SPEED THE BUREAUCRATIC PROCESS IN ISSUING AN ARGENTINE PASSPORT. WITH THE PASSPORT, THE FAMILY OBTAINS A VISA AND PURCHASES A TICKET FOR THE DETAINEE. ONCE THESE STEPS HAVE BEEN COMPLETED AND CERTIFIED TO THE MINISTRY OF INTERIOR, THE POLICE DELIVER THE DETAINEE TO THE AIRPORT AT THE APPOINTED DEPARTURE TIME AND EXECUTE DOCUMENTS WHICH VERIFY THAT THE PERSON HAS LEFT THE COUNTRY ON THAT PARTICULAR DATE.

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(E) IF HOWEVER, THE FIRST PETITION IS DENIED, THE PEN DETAINEE MUST WAIT ANOTHER 90 DAYS BEFORE SUBMITTING A SECOND PETITION. THE GOVERNMENT THEN HAS ANOTHER 90 DAY PERIOD TO REPLY TO THE SECOND PETITION. IF THE GOVERNMENT'S REPLY IS AGAIN NEGATIVE, THE PEN DETAINEE MUST WAIT ANOTHER 90 DAYS BEFORE SUBMITTING HIS THIRD PETITION, ETC.

ATTORNEYS FOR THE SERVICIO DE PAZ Y JUSTICIA BELIEVE THAT AFTER THE EXPIRATION OF A YEAR A DETAINEE SHOULD HAVE
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THE RIGHT TO PETITION THE SUPREME COURT TO INTERVENE IN THE CASE WHERE THAT GOVERNMENT HAS REPEATEDLY REFUSED TO GRANT THE RIGHT OF OPTION. HOWEVER, THIS POINT HAS NEVER BEEN DIRECTLY LITIGATED. THE LEGAL THEORY FOR SUCH AN APPEAL IS THAT DETAINING A PERSON UNDER EXECUTIVE POWER FOR MORE THAN A YEAR WITHOUT ANY CHARGES IS IN FACT PUNISHMENT WHICH IS EXPRESSLY PROHIBITED BY ARTICLE 23.

5. EFFECTS:

THE TRADITIONAL LENGTHY PROCEDURES FOR EXERCISING THE RIGHT OF OPTION REFLECT THE LAW AND ORDER BIAS OF THE ARGENTINE CONSTITUTION. THE EXECUTIVE IS ALLOWED TIME TO INVESTIGATE AND MAKE A DETERMINATION WHETHER A PERSON DETAINED UNDER THE P.E.N. SHOULD BE CHARGED AND TURNED OVER TO CIVIL, CRIMINAL, OR MILITARY AUTHORITIES FOR PROSECUTION. THE PROCEDURES TO BE PROMULGATED SHORTLY BY THE GOA WILL PROBABLY ADD AN ADDITIONAL FINAL POLITICAL REVIEW. UNDER THIS PROCEDURE THE THREAT TO NATIONAL SECURITY IN THE RELEASE FOR TRAVEL ABROAD OF SOME OF THE 1306 PERSONS THE GOA CLAIMS TO BE HOLDING UNDER P.E.N. WILL BE NEGLIGIBLE AND THE GAINS IN INTERNATIONAL PUBLIC RELATIONS WILL BE LARGE AS THE GOA CAN NO LONGER BE CHARGED WITH SUSPENDING AN IMPORTANT CONSTITUTIONAL PROVISION. WHAT IT WILL MEAN IN HUMAN TERMS IS STILL NOT KNOWN.
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